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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER EFREN DOMINGUEZ,

Defendant and Appellant.

G051747

(Super. Ct. No. SWF027470)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Kelly L. Hansen, Judge. Reversed in part and remanded with directions.

Torres & Torres and Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

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Javier Efren Dominguez was resentenced after this court reversed his conviction on nine of 24 counts of lewd acts on a child under the age of 14 (Pen. Code, § 288, subd. (a))¹, and affirmed his conviction on one count of possessing child pornography (§ 311.11). (*People v. Dominguez* (June 13, 2014, G049841) [nonpub. opn.] (*Dominguez*).) He appeals, arguing the trial court violated the proscription against double jeopardy when it increased the fines imposed on him under sections 1202.4, 1202.45, and 290.3 as part of the resentencing. Dominguez also claims he is entitled to an amendment of both the abstract of judgment and the sentencing minute order because each contains a provision not included in the trial court's oral pronouncement of sentence. Finally, he claims his presentence credits were not properly calculated, and asks that the case be remanded for a recalculation of his credits.

The Attorney General agrees with each of Dominguez's points, but argues his sentencing minute order need not be amended because the provision Dominguez challenges in that document – a prohibition against his possessing any firearms, deadly weapons, ammunition or incendiary devices – is merely reflective of a legal prohibition against prisoners possessing weapons, and was thus proper without regard to whether the trial court pronounced it orally. The Attorney General also disagrees with Dominguez's suggestion the case should be remanded for a calculation of his presentence credits, arguing instead that we should simply order the abstract corrected to reflect the correct number of credits.

We reject the Attorney General's contention that the firearms and weapons prohibition in the sentencing minute order should be retained because it is coextensive with the prohibition against prisoners possessing weapons, but we agree the judgment can be ordered corrected to reflect the proper number of presentence credits, and thus there is no need to remand that issue for recalculation by the trial court. We consequently reverse

¹ All further undesignated statutory references are to the Penal Code.

the judgment in part, and remand the case to the trial court with directions to: (1) reduce Dominguez's fines pursuant to sections 1202.4, 1202.45, and 290.3 to the amounts imposed in his initial sentence; (2) delete the additional \$300 restitution fine that was included in the abstract of judgment, but not pronounced by the court; (3) strike the provision in the sentencing minute order that prohibits Dominguez from possessing deadly weapons, etc.; and (4) give Dominguez 2,450 days of presentence credit as of February 24, 2015.

I

FACTS

In June 2012, Dominguez was convicted of 24 counts of lewd acts on a child under the age of 14, and one count of possessing child pornography. He was sentenced to a total term of 360 years to life in prison, and fined in various amounts. Among those fines were a \$2,000 restitution fine pursuant to section 1202.4 and a \$2,000 parole revocation restitution fine pursuant to section 1202.45, with the latter "suspended unless parole is revoked." He was also fined \$300 pursuant to section 290.3. The court stated Dominguez had 1,501 presentence credits, consisting of 1,306 days of actual credit plus 195 days of conduct credits.

Dominguez appealed, and this court reversed his convictions on nine of the 24 counts of lewd acts on a child under the age of 14, on the ground prosecution of those counts was barred by the statute of limitations. (*Dominguez I, supra*, G049841.) We also directed the trial court, which had erroneously concluded Dominguez was ineligible for probation, to consider whether probation should be imposed as part of the resentencing process. (*Ibid.*)

Following remand, Dominguez was resentenced. He was sentenced to a total term of 227 years to life in prison, and was again fined in various ways. The court ordered Dominguez to pay a restitution fine pursuant to section 1202.4, and to pay a parole revocation restitution fine pursuant to section 1202.45, with the latter again

“suspended unless parole is revoked.” However, both of those fines were increased from \$2,000 – the amount imposed in Dominguez’s first sentence – to \$4,500. Dominguez was also fined \$7,300 pursuant to section 290.3, an increase from the \$300 fine imposed under that section as part of his first sentence.

The court again stated Dominguez had 1,501 presentence credits, reciting the same numbers relied upon at his initial sentencing.

Although never mentioned by the court in its oral pronouncement of Dominguez’s sentence, the sentencing minute order also recites “Do not knowingly own, possess, have under your control or immediate access to any firearm, deadly weapon, ammunition or weapon related paraphernalia or incendiary device.”

And finally, Dominguez’s abstract of judgment reflects imposition of a separate \$300 restitution fine pursuant to section 1202.4, relating specifically to his conviction for possession of child pornography. However, that separate restitution fine was neither orally pronounced by the court nor included in its sentencing minute order.

II

DISCUSSION

1. Increased Fines

Dominguez first asserts the trial court violated the proscription against double jeopardy by imposing higher fines against him under sections 1202.4, 1202.45, and 290.3, when it resentenced him after reversal of some of his convictions on appeal. The Attorney General concedes that point, and we agree.

“When a defendant successfully appeals a criminal conviction, California’s constitutional prohibition against double jeopardy precludes the imposition of more severe punishment on resentencing.” (*People v. Hanson* (2000) 23 Cal.4th 355, 357 (*Hanson*)). The fine imposed against Dominguez under section 290.3, subdivision (a), is explicitly defined as a punishment: “Every person who is convicted of any offense

specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, *be punished* by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.” (Italics added.) Consequently, that fine could not be increased when Dominguez was resentenced. (*People v. Burnett* (2004) 116 Cal.App.4th 257, 261-262.)

And the fines imposed against Dominguez under sections 1202.4, subdivision (a)(1), and 1202.45, subdivision (a), are specifically characterized as “restitution” and are thus also considered punishment for purposes of double jeopardy. (*Hanson, supra*, 23 Cal.4th at p. 357 [“The question here is whether a statutorily mandated restitution fine comes within this [double jeopardy] rule. We conclude such fines constitute punishment and find no principled basis for excluding them”].)

Because the trial court was prohibited from increasing Dominguez’s punishment on resentencing, it erred by imposing greater fines under sections 1202.4, 1202.45, and 290.3, than had been imposed as part of Dominguez’s initial sentence. Consequently, the judgment must be modified to reflect restitution fines of \$2,000 under section 1202.4 and \$2,000 under section 1202.45, and a punitive fine of \$300 under section 290.3.

2. *Additional Restitution Fine*

Dominguez next points out the trial court erroneously included a separate \$300 restitution fine, imposed pursuant to section 1202.4, subdivision (b)(1), in his abstract of judgment, even though no such fine had been orally pronounced by the court. Again, the Attorney General agrees this was an error, calling it “inexplicabl[e].” We agree as well. The additional \$300 restitution fine must be stricken from the judgment.

3. Prohibition on Weapons Possession

Dominguez also complains that the trial court's sentencing minute order improperly includes the provision "Do not knowingly own, possess, have under your control or immediate access to any firearm, deadly weapon, ammunition or weapon related paraphernalia or incendiary device." Dominguez characterizes this provision as a "probation term," and although no probation was ordered in this case, he may be correct that the phrase was simply added to the minute order as a result of clerical error. No such provision was included in Dominguez's prior sentence.

And perhaps more significant, the provision was not orally pronounced by the court. "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zachery* (2007) 147 Cal.App.4th 380, 385.) When the minute order includes provisions not orally pronounced by the court, the proper remedy is to strike them. (*Id.* at p. 388.)

The Attorney General acknowledges the trial court did not include this weapons possession provision in its oral pronouncement of Dominguez's sentence, and agrees it is improper for a sentencing minute order to include a provision not pronounced by the court. However, the Attorney General contends there is no need to strike the provision in this case because it merely reflects the existing prohibition against prisoners possessing weapons, as set forth in section 4502. We are not persuaded.

The provision in Dominguez's sentencing order does not reference his status as a prisoner, and thus is not merely reflective of section 4502. But even if it were, the propriety of retaining clerical additions to a sentencing minute order does not turn on the supposed legal merit of those additions. And finally, section 4502, as well as any other statutory provisions limiting Dominguez's right to possess weapons, firearms, ammunition or incendiary devices, will remain applicable to him without regard to whether this mistaken provision is stricken from the sentencing minute order. Thus, the

provision, which was not pronounced by the trial court as part of Dominguez's sentence, must be stricken from the minute order.

4. Custody Credits

Lastly, Dominguez claims the trial court erred by failing to update his custody credits when it resentenced him. He explains he was entitled to additional credit for the days he served in prison between the date of his original sentencing and the date he was resentenced. He asks that the case be remanded for a recalculation of his custody credits. The Attorney General again acknowledges the error, but suggests we can simply order the credit total to be corrected, rather than remanding the case for a recalculation of credits by the trial court.

The Attorney General has also provided us with an analysis of the how the credit total should be corrected, explaining that the trial court had awarded Dominguez 1,501 days of custody credits when he was first sentenced on July 20, 2012, and because there are 950 days between that date and February 24, 2015 (the second sentencing date), the abstract should be corrected to show Dominguez is entitled to 2,450 days of custody credits as of "July 20, 2015." But those numbers do not quite work. Adding together 1,501 and 950 gives us 2,451, not 2,450. And "July 20, 2015" is not a relevant date in the analysis.

We can resolve the first issue on the basis that our own calculation reveals there are 949 days between the sentencing dates, not 950. And adding 949 to 1,501 results in the same total – 2,450. And we will presume the reference to "July 20, 2015" is merely a typo, and intended to refer to the second sentencing date of February 24, 2015. With those caveats, we agree with the Attorney General's calculation.

Significantly, Dominguez does not object to the Attorney General's claim that 2,450 days is the correct number of custody credits due to him as of his resentencing

date. Consequently, on remand, the judgment must be corrected to reflect Dominguez is entitled to 2,450 days of presentence credits as of February 24, 2015.

III

DISPOSITION

The judgment is reversed in part, and remanded to the trial court with directions to: (1) reduce Dominguez's fine imposed pursuant to section 1202.4 to \$2,000, reduce his fine imposed pursuant to section 1202.45 to \$2,000, and reduce his fine imposed pursuant to 290.3 to \$300; (2) delete the \$300 restitution fine included in the determinate sentence portion of the abstract of judgment; (3) strike the provision in the sentencing minute order which states "Do not knowingly own, possess, have under your control or immediate access to any firearm, deadly weapon, ammunition or weapon related paraphernalia or incendiary device"; and (4) give Dominguez 2,450 days of presentence credit as of February 24, 2015.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.